U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN HARVEY and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Tracy, CA

Docket No. 02-244; Submitted on the Record;
Issued August 21, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has any permanent impairment of his right upper extremity for which he is entitled to a schedule award.

On November 13, 2000 appellant, then a 36-year-old packer, filed a traumatic injury claim alleging that he injured his right shoulder in the performance of duty. The Office of Workers' Compensation Programs accepted his claim for a right shoulder sprain and right rotator cuff tear and authorized surgical repair. On January 19, 2001 appellant underwent extensive debridement of the glenohumeral right shoulder joint and subacromial arthroplasty of the right shoulder (decompression), performed by Dr. Peter A. von Rogov, his treating Board-certified orthopedic surgeon.

On August 10, 2001 appellant filed a claim for a schedule award. By letter dated August 15, 2001, the Office asked Dr. von Rogov to evaluate him for the purpose of determining whether he had any permanent impairment of his shoulder which would entitle him to receive a schedule award. On August 21, 2001 the Office received from Dr. von Rogov, a report dated August 12, 2001, in which he stated that appellant's condition was permanent and stationary, that he had minimal complaints and that his range of motion was excellent. Dr. von Rogov further listed the appropriate range of motion measurements for the right shoulder and noted that appellant had no disparity in musculature and that all test results were normal.

On October 18, 2001 the Office forwarded Dr. von Rogov's August 12, 2001 report to an Office medical adviser for review and proper application of his findings to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, which became effective February 1, 2001. In a report dated October 25, 2001, the Office medical adviser determined that appellant had no sensory deficit or pain and no loss of range of motion or strength and, therefore, was not entitled to a schedule award for the right upper extremity.

Subsequently, appellant submitted an updated September 30, 2001 report from Dr. von Rogov, which was received by the Office on October 26, 2001. In his report, Dr. von Rogov

noted that he was responding to the Office's August 15, 2001 request that he evaluate appellant pursuant to the A.M.A., *Guides*. Dr. von Rogov stated that appellant had reached maximum medical improvement on August 9, 2001 and that current testing of the right shoulder revealed 170 degrees of forward flexion, 40 degrees of extension, 160 degrees of abduction, 25 degrees of adduction, 90 degrees of internal rotation and 60 degrees of external rotation. Referencing the corresponding tables, figures and page numbers of the fifth edition of the A.M.A., *Guides*, Dr. von Rogov stated that appellant had a one percent upper extremity impairment due to loss of abduction, a one percent upper extremity impairment due to loss of forward flexion and a one percent upper extremity impairment due to loss of extension, for a total upper extremity impairment of three percent. He further stated that appellant's arthroscopic decompression of the subacromial space including the distal clavicle entitled appellant to an additional 10 percent impairment, which, combined with the range of motion impairments, equated to a 12 percent right upper extremity impairment.

By decision dated October 26, 2001, the Office denied appellant's claim for a schedule award on the grounds that he had not established any ratable permanent impairment of the right upper extremity.

The Board finds that this case is not in posture for decision.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In the instant case, the Office determined that appellant had no permanent impairment of his right upper extremity by adopting the findings of the Office medical adviser, who determined the precise impairment rating by applying Dr. von Rogov's August 12, 2001 findings regarding appellant's loss of flexion, extension, abduction, adduction, external rotation and internal rotation in appellant's right upper extremity, to the applicable figures and tables of the A.M.A., *Guides.*

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

As the Board's jurisdiction of a case is limited to reviewing the evidence which was before the Office at the time of its final decision,[3] it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.[4] As the Board's decisions are final as to the subject matter appealed,[5] it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to the Office, prior to the time of issuance of its final decision, be addressed by the Office. This is particularly important in the instant appeal where, as noted above, appellant submitted an additional detailed medical report from Dr. von Rogov, but there is no indication that any of this was considered by the Office. Because it does not appear that the Office considered the evidence that it received on October 26, 2001, in reaching its October 26, 2001 decision, the Board cannot review such evidence for the first time on appeal.[6]

Consequently, the case must be remanded for the Office to consider Dr. von Rogov's September 30, 2001 report. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision.

The decision of the Office of Workers' Compensation Programs dated October 26, 2001 is set aside and the case remanded to the Office for consideration of Dr. von Rogov's September 30, 2001 report, to be followed by an appropriate decision.

Dated, Washington, DC
August 21, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] 20 C.F.R. § 501.2(c).

[4] *See William A. Couch*, 41 ECAB 548 (1990).

[5] *See* 20 C.F.R. § 601.6(c).

[6] *See* 20 C.F.R. § 501.2(c).